IN THE HIGH COURT OF BOMBAY AT GOA
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CRIMINAL WRIT PETITION NO. 21 OF 2001

Shri Nandan Vasant
Pilgaonkar, major of
age, r/o AG1, 'Campo
Verde', Caranzalem,
Goa. ...Petitioner

Versus

Shri Narendra Y. Thaly,
major of age, r/o
'Raj Apartment', Behind
ACDIL High School,
Porvorim, Goa. ...Respondent.

Shri S. D. Lotlikar, Senior Advocate with Shri A. D. Bhobe, advocate for the petitioner.

Shri J. P. D'Souza with Ms. C. Colaco, advocates for the respondent.

CORAM: P. V. KAKADE, J.

DATE: 29th November, 2002.

ORAL JUDGMENT

This Criminal Writ Petition has been filed by the petitioner/original accused no.1, assailing the Order of the learned Additional Sessions Judge, Panaji, in Criminal Revision Application No.52/2000, decided on 4th May, 2001, dismissing the revision filed by the petitioner/accused no.1, challenging the rejection of his application for recall of process by Order of the learned Judicial Magistrate First Class, Panaji dated 5th July, 2000.

It may be noted that this Writ Petition was heard on merits and was disposed of allowing the Writ Petition, by Order dated 8th October, 2001, by this Court. However, the present respondent moved the Apex Court in Criminal

Appeal No.898/2002 and on hearing the parties, the Hon'ble Supreme Court was of the view that the High Court had proceeded on the basis as if the trial itself was over in the case even at the stage of issue of process and appreciated the material on record on that basis. It was further observed that it was brought to the notice of the Apex Court that there were several other aspects in the matter which were to be highlighted but the respondent did not have the opportunity to do so. On such basis, the Apex Court was pleased to set aside the Order of this Court and remitted the matter to this Court for fresh consideration in accordance with law.

Consequently, this Writ Petition was again heard on merits at length.

The facts giving rise to the case in short are thus:

The respondent/complainant filed a case which was registered as Private Criminal Case No. 40/98/B in the court of the Judicial Magistrate First Class, Panaji, holding an enquiry under Section 200 of the Criminal Procedure Code and recorded the statements of the complainant Narendra Thaly and P.W.2 Nanda Mohankrishnan Naik. Thereafter, the learned Judicial Magistrate First Class, taking into consideration the material that was

available against the accused, held that there was a prima facie case for issuing process under Sections 453 and 341 of the Indian Penal Code, against the petitioner/accused no.1 only. The other person, one Ronald Pinto, who was arraigned as accused no.2, was discharged as the learned Magistrate found that there was no material against the said Ronald Pinto for issuing of process. The learned Magistrate also found that there was no material for issuing process against the petitioner for an offence punishable under Section 506 of the Indian Penal Code. This Order of the learned Magistrate dated 17th November, 1999, issuing process against the petitioner/accused no.1, was sought to be recalled by the present petitioner after he was served with summons, by filing an application for recalling of process. In the said application, it was averred by the petitioner that Special Civil Suit No.34/98/B had been filed by the respondent/complainant seeking specific performance of an Agreement dated 15th March, 1995. In short, what was contended by the learned Magistrate was that the dispute before the learned Magistrate as stated in the complaint, was essentially a dispute of civil nature, which had been deliberately spiced by the respondent/complainant, for giving it a flavour of a criminal offence. The learned Magistrate, after hearing the parties, by Order dated 5th July, 2000, rejected the application for recall of the process.

2. In the meantime, the learned Magistrate recorded the plea of the petitioner for offences punishable under Sections no. 453 and 341 of the Indian Penal Code. The petitioner/accused no.1 being dissatisfied with the Order of the learned Magistrate, dated 5th July, 2000, filed a Criminal Revision Application before the learned Additional Sessions Judge, Panaji, which was heard on merits and came to be dismissed by the learned Additional Sessions Judge by his Order dated 4th May, 2001. In the earlier round of litigation, the Judgment and Order passed by the learned Additional Sessions Judge, Panaji, in Criminal Revision Application No.522000 was assailed before this Court by the respondent/complainant, by filing a Criminal Revision Application bearing no.6/2001 and by the present petitioner, by filing Criminal Writ Petition No.7/2001. Both the proceedings came to be decided by this Court by Judgment dated 29th March, 2001 and the learned Single Judge of this Court set aside the Order of the learned Additional Sessions Judge, Panaji, in Criminal Revision Application No.52/2000, which was dated 8th September, 2000, remanding the revision application to the learned Additional Sessions Judge, Panaji, for deciding it afresh in accordance with law. In compliance with the Order of this Court, the learned Additional Sessions Judge, Panaji, by his Judgment dated 4th May, 2001, dismissed the Criminal Revision Application No.52/2000, which is assailed in this proceeding by way of Criminal Writ Petition.

3. The facts on record further reveal that on 15th March, 1995, the respondent complainant entered into an Agreement with one M/s Quarlet Enterprises for purchasing three flats bearing nos. G-5, G-6 and F/5-6, in a building known as "River View Residency" situated at Ribandar, Goa, for a total consideration of Rs.14,49,300/-. It was alleged that the petitioner/accused no.1, is one of the partners of the firm M/s Quarlet Enterprises. It was also alleged in the complaint that by April, 1996, the respondent/complainant had paid the entire consideration to the said firm and the payment of the entire consideration was acknowledged by the said firm by its letter dated 23rd July, 1997. By the said letter, the respondent/complainant was called upon to pay the balance amount of Rs.24,300/- and take possession of the flats. The respondent/complainant further averred that by his letter dated 13th September, 1997, he had forwarded a pay order for Rs.24,300/- drawn on Syndicate Bank, Panaji, to the said firm and thereafter the petitioner/accused no.1, being a partner of the said firm, handed over the keys of the said three flats to the wife of the respondent/complainant on 7th October, 1997.

4. The complaint further discloses that after possession of the flats had been delivered to the respondent/conmplainant, he gave the said three flats on leave and licence to S/Shri C.S. Ramesh, N. M. Shenoy

and Rakesh Faria. According to the respondent/complainant, on 26th October, 1997, at about 10.30 a.m. Shri N. M. Shenoy alongwith the other two tenants came to the respondent/complainant and informed him that on 25th October, 1997, at about 8 a.m. the petitioner/accused no.1 had visited them and commanded them to vacate the flats by the next day, failing which he threatened that he would set goons on them and visit them with dire consequences. The three tenants also informed the respondent/complainant that apprehending danger to their lives, they had locked the said flats and brought the keys for delivering them to him. The respondent/complainant then accompanied by the three tenants went to inspect the said three flats. When he went to inspect the flats he was shocked to find that the back doors of the said flats were broken open and five persons, led by a person who was later identified as Ronald Pinto of Shadows Detective Pvt. Ltd. (accused no.2), had taken possession of the said flats. When told that the flats belonged to the complainant the said Ronald Pinto informed that accused no.1/petitioner, had taken possession of the flats and employed him and others of Shadows Detective Pvt. Ltd., with directions not to allow anyone to enter the said flats. The said Ronald Pinto and others were carrying weapons of assault. The two witnesses examined by the complainant have also given similar versions. Therefore, it was urged before the learned Additional Sessions Judge, Panaji, on behalf of the petitioner/accused no.1, that the

only material in respect of the offences punishable under Sections 453 and 341 of the Indian Penal Code consisted of a statement which was made by one Ronald Pinto to the complainant and the other tenants. The said statement is to the effect that Ronald Pinto and other persons accompanying him had told them that the petitioner/accused no.1 had taken possession of the said flats and accused no.1 had told the said Ronald Pinto not to allow any person, including the complainant, to enter the said flats without prior permission of himself.

5. I have heard Shri Lotlikar, learned Senior Counsel for the petitioner/accused no.1 and Shri D'Souza, learned counsel for the respondent. Shri Lotlikar submitted that the evidence taken as it is, does not, prima facie, disclose the commission of the offence as alleged against the petitioner/accused no.1. According to him, whatever the two witnesses have deposed about what Ronald Pinto told them was inadmissible in evidence on the ground of it being hearsay evidence. It was submitted that since Ronald Pinto was not examined as a witness, whatever he has stated to the other witnesses would be inadmissible in evidence. Secondly, it was submitted that assuming that whatever the witnesses have deposed about what was stated by Ronald Pinto to be admissible, it would be a confession of an accused, which would only bind him and not the other accused. Shri D'Souza brought to my notice that Ronald

Pinto was released and no process was issued against him by the learned Magistrate and, therefore, when the learned Magistrate was considering the evidence, it cannot be said that Ronald Pinto was co-accused and, therefore, it would not amount to confession. He also submitted that what was deposed to by the witnesses as to what Ronald Pinto had stated, would be admissible under Section 6 of the Evidence Act.

Upon perusing the evidence of these two witnesses, it is clear that the petitioner/accused no.1, was not found in the premises when the complainant and other tenants visited it. There was also no material before the learned Magistrate to show that either the petitioner/accused no.1, or the said Ronald Pinto had dispossessed the respondent/complainant. The material before the learned Magistrate, as seen from the record, clearly discloses that Ronald Pinto and four to five associates of his were found present in the flat. Therefore, obviously, an offence under Section 453 Indian Penal Code was prima facie disclosed having been committed by the said Ronald Pinto and his associates. However, the learned Magistrate for reasons not disclosed in his Order, chose not to proceed against him at all. The Order of the learned Magistrate has not been challenged by the complainant in revision uptil now. What the learned Magistrate seems to have accepted is what the two witnesses

had deposed about what Ronald Pinto had told them. According to the two witnesses, Ronald Pinto had stated to them that he had effected forcible entry into the flats, because he was told to do so by the petitioner/accused no.1 and he was also told by the petitioner/accused no.1 not to allow anybody to enter the flats. In fact, in my view, there was very strong material before the learned Magistrate to issue process against Ronald Pinto. However, the Magistrate chose not to even issue process against Ronald Pinto on the ground that there was no material against him.

As the record shows, Ronald Pinto had not allowed the respondent/complaint and others to enter the flats so, therefore, the offence, if any, under Section 453 or 341 Indian Penal Code is committed by Ronald Pinto. On the other hand, there is no evidence, or even prima facie material on record, to come to the conclusion that the petitioner/accused no.1 had committed the said offences. For arriving at a prima facie conclusion, there has to be some evidence. The respondent/complainant, need not lead evidence, which if unrebutted, would result into conviction. However, the complainant is enjoined with a duty of leading evidence which would prima facie show that the accused had committed an offence. The evidence led by the respondent/complainant should create a reasonably prima facie case to hold that there was possibility that the

accused had committed an offence.

6. Shri Lotlikar, learned Senior Counsel for the petitioner/accused no.1 strongly urged that it was nothing but a classic example of criminalization of a civil lis and, therefore, the Order of the learned Magistrate deserved to be quashed, especially when it is an admitted position that the petitioner/accused no.1 was not present at the scene of offence when it was committed. It is also brought to my notice by the learned counsel for the petitioner/accused no.1 that the process against the petitioner is not issued for offences punishable under Section 506 Indian Penal Code and, therefore, there is no question of taking cognizance of the incident on the earlier day, of alleged threatening by accused no.1, i.e. the petitioner. In other words, the only evidence against the petitioner/accused no.1 is that of a statement allegedly made by Ronald Pinto, i.e. accused no.2, stated to have done so by two witnesses. Therefore, it was submitted that the offence, if at all, committed under Sections 453 and 341 of the Indian Penal Code, was committed by Ronald Pinto and not by the petitioner/accused no.1. Moreover, when the facts revealed from the record show that Ronald Pinto was the prime accused against whom no process was issued, how can process be issued against the petitioner/accused no.1, who was stated to have instructed the said Ronald Pinto to commit certain acts?

In other words, when the main accused could not be proceeded against, the alleged abettor of the said offence also could not be proceeded against. Shri D'Souza, learned counsel for the respondent, submitted that under the provisions of Section 319 of the Criminal Procedure Code, the Court could still issue process against Ronald Pinto to arraign him for commission of the said offence. However, we are not proceeding on the hypothetical case, but the issue has to be determined on the facts basically available on record and, therefore, such submissions made on behalf of the respondent/complainant, cannot be taken into account.

7. Shri D'Souza, learned counsel for the respondent/complainant, also submitted that in particular cases both criminal law and civil law remedy can be persued in the diverse situations. As a matter of fact, they were mutually exclusive and clearly co-extensive and essentially differ in their content and consequence. He sought to put reliance on the ruling of the Apex Court in the case of **M/s. Medchl Chemicals & Pharma Pvt. Ltd.** vs. **M/s. Biological E. Ltd. & Ors.** {2000 (2) Supreme 261), wherein the Apex Court observed that it is anathema to suppose that when a civil remedy is available, a criminal prosecution is completely barred. In my considered view there cannot be two opinions in this regard that under certain circumstances both the remedies are open and thus

are co-extensive to each other. However, in the present case before us the facts revealed from the record show that a civil suit under the provisions of Section 6 of the Specific Relief Act is pending between the parties. In fact, the said suit was filed on that very day, but the Civil Court thought it fit to refuse the order of temporary injunction against the present petitioner. A counter-claim has also been filed in the said proceedings. This fact, alongwith the fact that the petitioner/accused no.1 was not present at the scene of offence and the prime accused, i.e. Ronald Pinto, was not even proceeded against eventhough clearly the complaint was aimed at him, would give substantial foundation to the submission made on behalf of the respondent, stating that civil lis is being criminalized in this case. The principle to be followed in such cases, as laid down by the Apex Court in **M/s. Medchl Chemicals'** case (supra), is that for quashing the complaint, the Court had to see whether on the fact-situation "civic profile" outweighs the "criminal outfit". In the present case before us there is absolutely no doubt that the "civic profile" of the case definitely outweighs the "criminal outfit", as submitted by the petitioner/accused no.1.

8. Shri D'Souza, learned counsel for the respondent, contended that the particulars of the offence had been explained to the petitioner/accused no.1 on 17th

July, 2000 and thus, according to him, the present petitioner's application for recalling the process was filed much earlier than the dated 17th July, 2000, on which the plea of the petitioner/accused no.1 was recorded by the learned Magistrate. Moreover, the ratio laid down by the Supreme Court in the case of **K. M. Mathew** vs. **State of Kerala & Anr.**, AIR 1992 S.C. 2206 is very clear. It shows that the Supreme Court had quashed the Order of issuing process even after the Magistrate had explained the substance of accusation to the accused. In my view, in the application under Article 227 of the Constitution of India, inherent powers of this Court under Section 482 Criminal Procedure Code are extremely wide. No doubt the Court has to be always circumspect while exercising inherent powers. The exercise of care and circumspection is all the more when the two Courts below had rejected the application for recall of process. However, at the same time, this Court has the powers under Section 482 Criminal Procedure Code, to pass such order as may be necessary to prevent abuse of the process of the Court, or otherwise to secure the ends of justice. It would be traversity of justice to ask the accused to face the rigours of trial after the Court comes to the conclusion that there is no material to issue process against him. This Court cannot put shackles on its powers merely because the substance of the accusation has been explained to the accused. If it appears that the criminal proceedings are an abuse of the process of the

Court, then the Court has the jurisdiction and power to quash the proceedings at any stage. As it is held in this case that there was no material against the petitioner/accused no.1 to be proceeded against, I am inclined to allow the present petition. As noted earlier, the application for recall of process had been filed before the trial Court, before the plea of the accused was recorded.

9. In the result, the Criminal Writ Petition is allowed. Criminal Case no.40/98/B pending on the file of the Judicial Magistrate First Class, Panaji, is hereby quashed and the Order of the learned Judicial Magistrate First Class and the Judgment of the Additional Sessions Judge in Criminal Revision Application No.52/2000 are quashed and set aside. Rule is made absolute in the Criminal Writ Petition, on the above terms, with no order as to costs.

P. V. KAKADE, J.

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